LIBRARY
UPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 27 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 964

RANDOLPH ERWIN ROSENSON
Petitioner

versus

UNITED STATES OF AMERICA
Respondent

PETITION FOR REHEARING FROM DENIAL OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN "RANDOLPH ERWIN ROSENSON VS. UNITED STATES OF AMERICA" No. 26,976 OF THE DOCKET OF SAID COURT.

G. WRAY GILL, SR.
GEORGE M. LEPPERT
1707 Pere Marquette Bldg.
New Orleans, La.
Attorneys for Petitioner
CAMILLE M. GRAVEL, JR.
611 Murray St.
Alexandria, La.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 964

RANDOLPH ERWIN ROSENSON

Petitioner

versus

UNITED STATES OF AMERICA

Respondent

PETITION FOR REHEARING FROM DENIAL OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN "RANDOLPH ERWIN ROSENSON VS. UNITED STATES OF AMERICA" No. 26,976 OF THE DOCKET OF SAID COURT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Rosenson urges the following issues, not previously presented to this Court, but preserved by express reservation below, as a basis for rehearing of the denial of certiorari by this Court:

WHETHER THE TRIAL COURT ERRED IN DENYING A MOTION OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE BECAUSE OF FAILURE OF THE GOVERNMENT TO PROVE A PRIOR CONVICTION, AN ESSENTIAL ELEMENT OF GUILT UNDER 18 U.S.C. 1407.

Petitioner was being prosecuted for failure to register, as required by 18 U.S.C. 1407 of those previously convicted of State or Federal narcotics violations, upon leaving or returning to the United States.

This issue was presented to the Fifth Circuit Court of Appeals as our first assignment of error but has not been urged previously in this Court.

ARGUMENT

In order to sustain a conviction, of course, it was essential that the Government prove a previous narcotics conviction under the terms of the statute. In its case in chief, the sole basis whereby the Government sought to prove this conviction was apparently the intended offer of a certified copy of a judgment of conviction in the state court on January 11, 1965. This offer was made as follows toward the close of the Government's case: (R. 130)

> THE COURT: * * * What other documents do you have?
>
> MR. CONNICK: And G-8, your Honor, which is a certified copy of the conviction of one Randy Rosenson, who on the 11 day of January, 1965 withdrew a former plea of not guilty to the State of Louisiana, to an attempt to possess

narcotic drugs, to-wit, marijuana. This plea was accepted by the State. And it shows that the defendant was born on March 20, 1934, also, which coincides with the birth certificate.

"And this, we submit, is properly certified by the Clerk of the Criminal District Court for the Parish of Orleans, signed by JUDGE MALCOLM V. O'HARA, again properly certified by the Clerk of Court.

THE COURT: And that is the G-8?

MR. CONNICK: G-8.

THE COURT: Does that complete your offers?

MR. CONNICK: Yes, sir."

Immediately thereafter the defense made an objection to all of the offered documents, including, of course, the one just noted, the purported judgment of conviction, G-8. These objections were all overruled without discussion. (R. 131) Thereupon, the Government rested its case (R. 131)

Immediately thereafter the defense moved for an acquittal (R. 132)

Stating that there were serious constitutional questions involved, counsel for defendant then asked that he be permitted a delay in which to file a memorandum in support of this motion for acquittal so as to preserve the rights of defendant at this stage and it was agreed by the court and all parties that such leave would be granted but that the defendant would proceed to complete its case forthwith. (R. 132, 133)

THE FATAL DEFECT IN THE GOVERNMENT'S PROOF AT THIS STAGE WAS THAT, APPARENTLY THROUGH OVERSIGHT, THE GOVERNMENT HAD NOT ACTUALLY OFFERED A CERTIFIED COPY OF THE JUDGMENT OF CONVICTION AT ALL. INSTEAD, THE PURPORTED PROOF OF SUCH CONVICTION, JUDGMENT OR SENTENCE, G.8, (R. 130) CONSISTS OF *TWO* CERTIFICATES ATTESTING THE VALIDITY OF THE SIGNATURES AND STATUS OF THE STATE JUDGE AND CLERK OF COURT, BUT NO COPY WHATEVER OF THE PURPORTED JUDGMENT OR SENTENCE OR CONVICTION ITSELF. Presumably, the Government, through oversight simply offered two certified copies of the certificates attesting the signatures and status, instead of one copy of the judgment or sentence and one copy attesting the validity of the signatures thereon.

THE NET RESULT, OF COURSE WAS THAT THE RECORD WAS UTTERLY DEVOID OF A SINGLE SCRAP OF PAPER SHOWING THE STATE CONVICTION OR SENTENCE OR A SINGLE LINE OF TESTIMONY INDICATING SUCH CONVICTION OR SENTENCE.

True, after the motion for acquittal was denied, and after the defense was permitted to reserve the right to file a memorandum in support of the motion to dismiss as of that time, the defense did put on evidence of its own and the defendant himself, in answer to a question under cross, did admit that he had been given a suspended sentence under a plea of guilty to "attempted possession of marijuana" consisting of 11 cigarettes.

We concede that there is a sharp division of authority

in the various circuits as to whether or not, having made a motion for directed verdict of acquittal in such circumstances as that outlined above, a defendant is deemed to have waived his rights to complain of the sufficiency of the evidence by putting on evidence of his own.

WAIVER NOT FAVORED IN MODERN JURISPRUDENCE

We concede that, under the older cases the rule generally was that, after denial of a motion of acquittal at the close of the Government's case, if the defendant elected to put on evidence of his own, this might amount to a waiver of the status as it existed at the close of the Government's case. It is submitted, however, that this "waiver doctrine" is rapidly falling into disfavor. In his well known text on Federal practice, Wright, in Federal Practice and Procedure (Criminal) Vol. 2, Sec. 463 at page 247, states:

> "This waiver doctrine has come under heavy attack and there are signs that it may be crumbling. In several cases courts have been at pains *to consider the sufficiency of the evidence at the time the motion was made* after the government rested. In the District of Columbia Circuit the rule seems to have been abandoned entirely, and the court does not consider later evidence in determining whether the motion should have been granted at the close of the government's case. The criticism of the waiver doctrine rests on the view that it "seriously limits the right of the accused to have the prosecution prove a prima facie case before he is put to his defense" and that it "was imported from civil into criminal trials without considering the demands of our accusational system of criminal justice." (Emphasis added)

In support of the above text the author cites the following recent cases: *Cephus v. United States*, CA 1963, 324 F. 2d 893; *Moore v. United States*, CA 8, 375 F. 2d 877, *United States v. Godel*, CA 4th, 1966, 361 F. 2d 21, cert. den. 385 U.S. 838; *Franklin v. United States*, CA 1964, 330 F. 2d 205; *Belton v. United States*, CA 1967, 382 F. 2d 150; *Austin v. United States*, CA 1967, 382 F. 2d 129.

The above issue was specifically reserved before the Fifth Circuit, but not argued, counsel for petitioner stating that he elected not to consume his limited time in arguing this point because the Fifth Circuit, in recent decisions, had firmly taken the minority view, namely, that putting on of evidence by a defendant amounts to a waiver of any evidentiary deficiency in the Government's case where said evidence supplies what the Government's case lacked as of the making of the directed verdict of acquittal.

The Government, on this issue, took a double stance: First, it urged that the Fifth Circuit stand, as noted, made the point moot; Secondly, it called attention to a letter from the Clerk of Court attaching a photocopy of the missing sentence of conviction.

It is submitted that this highly informal method of correcting the record, without formal motion or order, but simply on a basis of friendly corresponuence between the United States Attorney and the Clerk, cannot be countenanced.

In conclusion on this point it is urged that:

(a) There is a sharp divergence of authority between the various Circuits; and

(b) Such divergence is a classic case for the exercise of this Court's supervisory jurisdiction.

NEW ISSUE—SCIENTER NOW REQUIRED

On Jan. 20, 1970 the Second Circuit Court of Appeals held, in *United States of America v. Mancuso* (6 Criminal Law Rep. 1078) that an essential element of this identical offense, i.e. failure to register under 18 U.S.C. 1407, is *guilty knowledge that one is required to register.*

The commentator in this as yet unreported case, summarizes the decision as follows:

"The trial judge had expressly found that the traveler had no knowledge of the requirement. The evidence at trial showed that there were no public notices of the requirement posted in any of the areas of Kennedy International Airport through which passengers are routed.

"Saving the constitutionality of the statute by reading into it a scienter requirement, a majority of the court suggests several ways in which the statute could be better enforced by the posting of notices and giving convicted drug offenders copies of the statute to read.

Judge Moore, who concurs in the result, would neither inform the Justice Department on enforcement methods nor "declare here when ignorance of the law is an excuse. (Page 2344)"

This point, lack of knowledge as to the requirement of registering, was urged in the lower Court at every stage of the proceedings, but, under the law as it then stood, it was rejected.

It is submitted that, since there is now at least some divergence between the various circuits, in view of Mancuso, supra, here again there now exists a classic case for exercise of this Court's supervisory jurisdiction.

CONCLUSION

Two new issues are thus presented to this Court in support of a plea for a rehearing of denial of certiorari. Aside from the valid technical reasons which urge the grant of such rehearing, moral grounds are persuasive that this be the case in which the current confusion should be swept away. Here we have the case of a wholly reformed marijuana user, who has not only reformed himself but had assisted the Government as an informer, being the victim of an entrapment which may well have been due to his refusal to go further in acting as an informer.

For the foregoing reasons we respectfully submit that a rehearing should be granted and that the judgment below should be reversed.

Respectfully submitted,

G. WRAY GILL, SR.
GEORGE M. LEPPERT
1707 Pere Marquette Bldg.

CAMILLE F. GRAVEL, JR.
611 Murray St.
Alexandria, La.
ATTORNEYS FOR PETITIONER

CERTIFICATE OF COUNSEL

I certify that the foregoing petition for rehearing is presented in good faith and no for the purpose of delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

.....

OF COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I George M. Leppert, a member of the Bar of this Court in good standing and of counsel for petitioners in the above application for rehearing, do hereby certify that a copy of the foregoing petition for rehearing has been served upon the Solicitor General of the United States and upon the United States Attorney for the Eastern District of Louisiana, properly addressed and postage prepaid, on t he ..... day of March, 1970.

.....

GEORGE M. LEPPERT